FOR ARGUMENT

(7)

No. 96-6133

In The

Supreme Court of the United States

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden
Pontiac Correctional Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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I.

SUMMARY OF ARGUMENT

Respondent is incorrect in claiming that Federal Habeas Rule 6(a), as it has been interpreted by this Court, requires the same showing which is needed to obtain an evidentiary hearing. Respondent incorrectly suggests that the standard that must be met in order to establish a due process claim based upon judicial bias is that there must be a showing of actual bias in a particular case. According to well established case law, the correct standard for evaluating a judicial bias claim is whether there is a reasonable likelihood that the biasing influence was a component of the decision making of the court. Respondent's concern that a decision in favor of Petitioner will have a disruptive impact on the states' legitimate interests in the finality of judgments and will place an undue burden on the states in other cases is based upon unfounded speculation, considering the unique circumstances of this case and the limited nature of the question presented for review. Respondent has waived the *Teague* argument by not asserting it below. Assuming that it has not been waived, *Teague* is inapplicable because Petitioner is not claiming the benefit of a new rule. Furthermore, consideration of *Teague* is premature and should be held in abeyance pending completion of discovery. Respondent has waived the argument that newly enacted Title 28 United States Code § 2254(e)(2) governs this case by not raising it in its brief in opposition to the petition for a writ of certiorari and by not arguing it substantially in its brief on the merits. Assuming that the argument is not waived, § 2254(e)(2) doesn't apply to this case because it only extends to situations where a habeas petitioner

"failed" to develop the factual basis of the claim in state court. Petitioner did not "fail" to do anything because he tendered his due process claim to the Illinois Supreme Court, as soon as the factual basis of the claim became known to him, and the Illinois Supreme Court declined to consider it. Finally, application of § 2254(e)(2) to this case violates the presumption against retroactivity.

II.
ARGUMENT

Respondent argues incorrectly that in order to be entitled to discovery under Habeas Rule 6(a), a petitioner must demonstrate a prima facie claim for relief. In *Blackledge v. Allison*, 431 U.S 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977), this Court acknowledged that a District Court has discretion under Rule 6(a) to order discovery as a means of determining whether or not an evidentiary hearing is necessary. Under the law which is applicable to this case, an evidentiary hearing is required in Federal Habeas Corpus proceedings if there is a factual dispute material to the claim, and Petitioner has not had a full and fair opportunity to develop the facts in state court. *See, Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963) and *Keeney v. Tamayo Reyes*, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992). Respondent seems to be arguing that the showing required for discovery is the same as that which is necessary to establish the right to an evidentiary hearing. This is contrary to the holding in *Blackledge*.

Respondent argues incorrectly that in order to be entitled to relief on a judicial bias claim, a petitioner must

demonstrate actual bias in a particular case.[1] This position is contrary to the previous decisions of this Court. In *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499 (1971), this Court held that due process requires a criminal contempt trial before a different judge in the event that a party makes direct personal attack on the judge, without reference to actual bias on the part of the judge who was the subject of the attack. In *Ward v. Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), this Court held that due process required the disqualification of a municipal judge, where the municipality derived significant revenue from fines imposed in the event of ordinance violations, again without reference to actual bias. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985), this Court held that due process required the disqualification of a State Supreme Court judge who also was the plaintiff in another lawsuit which dealt with the same legal question that in his capacity as judge he was called upon to decide. In *Aetna Life*, this Court specifically ruled that a showing of actual bias was unnecessary, stating:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would

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[1] The 7th Circuit in this case applied the same incorrect legal standard. While denial of discovery under Habeas Rule 6(a) may be reviewed for abuse of discretion, as argued by Respondent, it is an abuse of discretion to apply incorrect legal principles. *Hunt v. National Broadcasting, Inc.*, 872 F.2d 289, 292 (9th Cir. 1989).

> offer a possible temptation to the average- . . . judge . . . to lead him not to hold the balance nice, clear, and true." Ward 409 U.S., at 60 (quoting Tumey v. Ohio, *supra*, at 532).

475 U.S. at 825.

The above cited cases clearly establish that a showing of actual bias in the particular case is not a necessary element of a due process claim, and that a claim is established if there is a reasonable likelihood that the biasing influence was a component of the judge's decision making.

Based on an erroneous assumption that actual bias must be shown, Respondent endeavors to establish that Judge Maloney's many adverse rulings at Petitioner's trial and sentencing hearing were either correct or at least "legally defensible". *See* Respondent's Brief 17-22. Petitioner maintains that the critical inquiry under the Due Process Clause is whether discretionary decisions that potentially affected the outcome of the case were untainted by an apparently corrupt motive, not whether such decisions might have otherwise fallen within the ambit of judicial discretion or were legally correct. Petitioner asserts that it is impossible to make this determination in the absence of further inquiry.

For example, an important discretionary ruling that gives cause for concern is the manner in which Judge Maloney dealt with Petitioner's request for a continuance of the sentencing hearing. Petitioner's trial in state court began on July 20, 1981. TR 100. The jury returned guilty verdicts on July 29, 1981. TR 1420-1424. After the jury returned its verdicts, the Assistant State's Attorney filed a

motion for a death penalty hearing pursuant to the Illinois Statute. TR 1424. On July 30, 1981 after defense counsel moved unsuccessfully for a continuance, and objected unsuccessfully to introduction of the evidence of the Arizona homicides, the jury began hearing testimony in the penalty phase. TR 1456.

Assuming that the police reports regarding the Arizona homicides were delivered to Petitioner's trial counsel at the commencement of the guilt phase of the Illinois case, as Respondent suggests, he would have had less than two full weeks to attempt to prepare a defense to a second homicide charge, while in the midst of representing Petitioner in the guilt phase.[2] Although it may not have been an abuse of discretion on the part of Judge Maloney to deny Petitioner's request for a continuance of the sentencing hearing, other reasonable and fair minded jurists might have exercised their discretion differently. They might have granted a brief postponement of the penalty phase as requested by Petitioner's trial counsel, or they might have decided to exclude the evidence of the Arizona homicides based upon insufficient notice to the defense. This was a discretionary ruling which was likely to have affected the sentencing decision made by the jury. In the absence of more information, it is impossible to say with any degree of certainty that Judge Maloney made

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[2] It is apparent that trial counsel was unprepared to go forward in the penalty phase of the Illinois trial. He rested at the conclusion of the State's case, presenting no affirmative evidence to controvert aggravating factors or to mitigate the severity of the sentence. TR 1625-1628.

this decision independently of a corrupt motive to maintain a false facade as a "law and order" judge.

Another questionable discretionary decision was the selection of appointed counsel. Petitioner's trial counsel, who was appointed directly by Judge Maloney, (Supplemental Transcript 46, 47), conceded his lack of experience in handling capital cases when he told the jury in the final argument in the penalty phase that he never before faced the necessity of pleading for someone's life after a guilty verdict. TR 1637, 1638. While the selection of indigent defense counsel is often a matter committed to the trial court's discretion, a reasonable and fair minded jurist might well have decided to appoint someone with more experience in defending capital cases than Mr. MacDonald. Again, given the state of this record, it is impossible to say with confidence that Judge Maloney did not deliberately select a less experienced lawyer to represent Petitioner due to a corrupt motive, such as a desire to insure a guilty verdict and a death sentence in a high profile case.[3]

Respondent argues that the significant costs associated with federal habeas review mandate strict construction of the "good cause" standard under Federal Habeas Rule 6(a). *See,* Respondent's Brief at 8-10. According to Respondent, these costs might include the possibility that habeas petitioners will deliberately withhold their claims

[3] As was pointed out in the amicus brief submitted by Concerned Illinois Lawyers, former Judge Maloney boasted of the conviction and sentence of Bracy and Collins at the time of his own sentencing. *See,* Amicus Brief of Concerned Illinois Lawyers at 11.

from resolution by the state courts. *Id.* at 9. Respondent also fears that federal district judges will be more inclined in the future to grant discovery requests, thus imposing onerous burdens on the states and disrupting their legitimate interests in the finality of judgments. Respondent's concerns about the ramifications of a decision favoring Petitioner's discovery request are unjustified. This case comes before the Court in a unique posture and a decision for Petitioner is unlikely to have much of an impact on other cases.

First of all, this is not a case where Petitioner could have submitted his claim to the state court but deliberately failed to do so. The facts upon which Petitioner rests his claim were not known to him and could not have been known, until late in the state post conviction proceedings, when he did in fact present his claim to the state court. Secondly, the limited nature of the question presented for review makes it unlikely that other cases will be affected. Finally, there is a unique public policy consideration favoring Petitioner's discovery request, which is unlikely to be present in many other cases, namely the need in this capital case for there to be a full airing of the facts in one of the most sordid instances of judicial corruption in American jurisprudence.[4]

Respondent also expresses the concern that in the event that this Court rules in favor of Petitioner, numerous convictions may be vulnerable to attack. *See,*

[4] In the absence of discovery, the full extent of Judge Maloney's corruption and the degree to which it perverted the reliability of the fact finding process in Petitioner's case will never be known.

Respondent's brief at 14. However, this case is special among the Judge Maloney cases in that it was a high profile capital prosecution sandwiched between two murder bribes, (JA 27, 36, 37), and the surrounding circumstances may have provided Judge Maloney with additional incentive to showcase his alliance with the State. In any event, Respondent's concern about the impact that this case may have upon other cases involving judicial corruption is premature. Questions as to the remedy that a court may wish to fashion in the event that a due process violation is discovered cannot be adequately addressed until there has been full disclosure of the facts.

Respondent suggests that Petitioner is advocating application of a new rule to a case pending on collateral review, which is forbidden by *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989). Respondent never argued *Teague* below, and therefor the argument is waived. *Air Courier Conf. v. Postal Workers*, 498 U.S. 517, 522, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991). Although this Court has discretion to address the *Teague* claim sua sponte, *see*, *Caspari v. Bohlen*, 510 U.S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994), it should decline to do so. The main purpose of the *Teague* doctrine is to validate reasonable interpretations of existing precedents. *Stringer v. Black*, 503 U.S. 222, 237, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). Since Petitioner was never able to submit this claim to the state court, the main rationale for applying *Teague* is inapplicable; the state is not in a position to claim it relied to its detriment on existing precedent.

Moreover, Respondent is incorrect in asserting that Petitioner is advocating application of a new rule. A case

announces a new rule if the result was not dictated by precedent existing at the time that the conviction became final. *Teague*, 489 U.S. 301. Here, Petitioner is not relying on a new rule but on *Tumey*, *Ward*, and *Mayberry v. Pennsylvania*, all of which were decided before Petitioner's conviction became final. Nor is Petitioner seeking application of a prior decision in a novel setting. *See*, *Stringer v. Black*, 503 U.S. 227. As was stated by Judge Rovner in her dissenting opinion in the Seventh Circuit:

> But surely common sense counts for something in the *Teague* analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison not on the bench. There is, in short, nothing surprising about petitioners' claim.

Bracy v. Gramley, 81 F. 3d 684, 704 (7th Cir. 1996).

In any case, *Teague* is a rule of substantive law rather than procedure and it is premature to discuss it without full knowledge of the facts. In the absence of discovery, no one is in a position to know whether *Tumey* is being invoked in a novel setting or not. Any consideration of the *Teague* question in this case should therefor be deferred until after the completion of discovery.

Respondent does not argue but apparently relies on the amicus brief to suggest that Petitioner's opportunity to obtain an evidentiary hearing is precluded by newly enacted Title 28 United States Code § 2254(e)(2), and therefor Petitioner is not entitled to discovery. Since Respondent did not include it in its brief in opposition to

the petition for certiorari, and did not argue it substantially in its merits brief, the issue is waived. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985); *Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); and *see*, Supreme Court Rule 15.2.[5] The provisions of the Antiterrorism and Effective Death Penalty Act ("ADEPA") do not affect the subject matter jurisdiction of the Court, and therefor the State's failure to raise the question constitutes waiver. *Emerson v. Gramley*, 91 F. 3d 898, 899 (7th Cir. 1996); *Huynh v. King*, 95 F. 3d 1052, 1055, n.2 (11th Cir. 1996).

Although the issue has been argued in the amicus brief, this Court may decline to consider it because it has not been raised by the parties. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n. 2, 67 L. Ed. 2d 732, 101 S. Ct. 1559 (1981). This Court has expressed reluctance to consider arguments raised only in an amicus brief when the issue is one of first impression, involving interpretation of a federal statute, and the Department of Justice has declined to take a position. *Davis v. United States*, 512 U.S. 451, 129 L. Ed. 2d 362, 370, 114 S. Ct. 2350 (1994).

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[5] The Attorneys General are incorrect in their contention that the application of § 2254(e)(2) to this case is a subsidiary question fairly included in the question presented. A question is not "fairly included" if it is not essential to the analysis of the question presented. *See, Procunier v. Lavarette*, 434 U.S. 555, 560 n. 6, 55 L. Ed. 2d 24, 98 S. Ct. 855 (1978). A threshold inquiry that in no way depends on the merits of the case is not a subsidiary question. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993). Including an issue in the briefs does not bring the question before the Court. *Id.* at n.5.

Assuming that this Court is inclined to address the issue, § 2254(e)(2), by its terms, does not apply to this case. The relevant portion of the statute provides:

> If the applicant *has failed to develop the factual basis of the claim* in state court proceedings, the court shall not hold an evidentiary hearing. . . .[6]

Petitioner did not "fail" to do anything. The District Court found that Petitioner attempted to bring the claim to the attention of the state court as soon as he became aware of its existence and the Illinois Supreme Court declined to consider it. *U.S. Ex Rel. Collins v. Wellborn*, 868 F. Supp. 950, 991 (N.D. Ill. 1995). Leaving aside the question of whether § 2254(e)(2) applies regardless of cause or fault, use of the phrase "failed to develop" implies inaction, and in this case Petitioner acted with diligence in tendering his claim of judicial bias to the state court.

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[6] In its entirety, § 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) The claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense . . .

The position taken by the Attorneys General in the amicus brief suggests a precedent that is both dangerous and ridiculously harsh. The District Court in this case also made a finding that the time within which Petitioner would have been able to secure relief under the Illinois Post Conviction Act had expired. *United States Ex Rel. Collins v. Wellborn*, 868 F. Supp. at 991. According to the Attorneys General, a state court may arbitrarily decline to hear a claim that goes to the heart of a defendant's right to a fair trial and a fair sentencing in a capital case, and the defendant may thereby be deprived of the right to develop the factual basis of the claim in any court, unless he can demonstrate actual innocence by clear and convincing evidence. According to the Attorneys General, Petitioner is deprived of any remedy, although he claims that the trial and sentencing hearing in his case were unreliable and unfair, simply because Judge Maloney was devious enough to conceal his corruption for a number of years after Petitioner's conviction became final.

If for no other reason than that the argument in the amicus brief fosters an unduly harsh and unjust result, this Court should decline to consider the applicability of § 2254(e)(2) to this case, when it is under no obligation to do so. Alternatively, this Court should construe the phrase "failed to develop" in § 2254(e)(2) to be inapplicable to situations where a habeas petitioner has diligently tendered the claim to the state court, the state court has declined to consider it, and there remains no opportunity to present the claim in state court. Such an interpretation is necessary if this Court wishes to avoid the impression that the Great Writ has been reduced to the status of a "rubber stamp".

Assuming for the sake of argument only that what transpired in Petitioner's case constitutes a "failure to develop", as that phrase is used in § 2254(e)(2), the statute doesn't apply to this case which was pending prior to the date of enactment. Application of § 2254(e)(2) to this case violates the presumption against retroactivity. In *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), this Court stated:

> When a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course there is no need to resort to judicial default rules. When, however, the statute contains no express command, the court must determine whether the new statute would have retroactive effect, i.e., *whether it would impair rights a party possessed when he acted*, increase a parties liability for past conduct, or impose new duties with respect to transactions completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S. Ct. 1504, (emphasis supplied).

At the time that the petition was filed and considered by the District Court, Petitioner had the right to an evidentiary hearing to develop his claim that he was deprived of a fair and reliable trial and capital sentencing as a result of judicial bias, assuming that he was not afforded an opportunity to do so in state court. Moreover, he was afforded this right regardless of his ability to demonstrate actual innocence by clear and convincing

evidence, as he would now be required to do under § 2254(e)(2)(B). Since the statute thus deprives Petitioner of a right he possessed at the time that he filed his petition, the presumption against retroactivity is invoked, and there is nothing in Section 104 of the Amendments to § 2254 to suggest that it was intended to apply to cases pending on the date of enactment.[7]

Respondent contends that much is being done to combat the erosion of public confidence in the Illinois court system. *See*, Respondent's brief at 15. However, that is small comfort to Petitioner who claims that he was deprived of fair and reliable trial and capital sentencing because he had a racketeer as a judge. Ultimately, even the State will benefit if we are allowed to learn how Judge Maloney's corruption affected his behavior in those cases in which he did not receive bribes. Either the state will be able to say with confidence that the corruption had no effect on the judgment, or at least that the full extent of the corruption finally became known and appropriate corrective measures were taken. Either way, the public and the judicial system will benefit from the result.

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[7] The fact that § 2254(e)(2) deals with a procedural rule doesn't affect the applicability of the presumption against retroactivity. This Court in *Landgraf* noted that, "the mere fact that a new rule is procedural does not mean it applies to every pending case", and "we do not restrict the presumption against statutory retroactivity to cases involving vested rights". 114 S. Ct. 1502, n.29.

III.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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